

Towards the 8th Decade of the Grundgesetz

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2019-04-20T11:34:01

On 23 May the *Grundgesetz* will turn 70, and Germany, the land of *Verfassungspatriotismus*, will be flooded with symposia and all sorts of solemnities to pay tribute to our constitution and its achievements. With such large supplies of constitutional reflectiveness to expect, I'd rather not wait too long to bring my own effort to dignify our *Grundgesetz* jubilee to your attention. It has been published [here](#), if you read German, and deals with the robustness of our constitution in the form of a thought experiment: What would happen if a majority modelled on Viktor Orbán's Fidesz or Jarosław Kaczyński's PiS won the *Bundestag* election?

My starting point is the thesis that the robustness of a constitution does not primarily depend on the hounds of "militant democracy" it holds to keep revolutionaries, putschists and enemies at bay. These dangerous creatures are to be let loose only in extreme and exceptional situations lest they turn against their keepers and pounce on the constitution itself. For the ordinary operation of democracy, with majorities forming and changing in the free play of political forces, something different is of the essence: The power a democratically won and constitutionally formed majority is entitled to must not extend to the rules by which the majority is won and formed in the first place. An election victory is not a basis for changing the constitution. The extent to which a constitution ensures this is much more decisive for its robustness than the most powerful security state.

+++A Note from University of Frankfurt+++

Weimar Moments: Constitutionalizing Mass Democracy in Germany, Italy, Spain, and Beyond

Call for Papers

The Weimar Constitution was among the first constitutions that aimed at organising a mass democracy in which the social question played a key role. Such "Weimar Moments" and their significance for the current European constitutional crisis will be at the centre of a workshop in Madrid, 13-15 November 2019.

Please see the full Call for Papers [here](#). Deadline: 1 June 2019. A co-operation between scholars from U Frankfurt, UA Madrid, U Valencia, U Ferrara and MPI for EU Legal History.

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If that is true – what about the robustness of the *Grundgesetz* in its eighth decade? In Hungary and Poland, the difference between the legislative and constitutional majority has been eliminated in different ways: in Hungary by an electorally won two-

thirds majority in a unicameral system, and in Poland by a long term constitutional crisis.

In Germany this difference is regulated in a comparatively clear and stable manner: A two-thirds majority in both chambers is required in order to amend the rules of the game, so the winner of the election cannot usually change the constitution without the support of the defeated minority. This only works as far as the letter of the constitution itself is concerned, though. A large part of the federal constitutional law of Germany, and not the least important, is not regulated in the *Grundgesetz* itself, however, but in ordinary federal laws: in the Federal Election Law, in the Party Law, in the Deputies Law and in the Rules of Procedure of the *Bundestag*. Particularly critical is in my view the Federal Constitutional Court Act which any Bundestag majority would be free to change in ways that could be used to severely damage the reputation and effectiveness of the Federal Constitutional Court. This won't happen? Well, it already did. Just a few hundred kilometers to the East.

Three constitutional narratives

Constitutional anniversaries have marked the turning points of my active professional life since the beginning. My first big project back in the late 1990s was a travelling exhibition which I planned together with my sister Marion Detjen and my brother-in-law Stephan Detjen, on the subject of "50 Years of *Grundgesetz*". The narrative seemed to be blissfully obvious in 1999: from rags to riches, from the provisional "basic law" of divided and occupied Western Germany to the constitution of the reunited, free and fully sovereign Federal Republic. Ten years later, just before the 60th anniversary of the German constitution, I quit my job at *Handelsblatt*, and the three of us wrote a [book on the constitutional history of the Federal Republic](#). The narrative had changed – no longer German unity, but the European Union appeared as the point on the horizon where the lines of constitutional evolution of Germany, with their characteristic pattern of regaining sovereignty by supranational integration, are crossing.

Another ten years later, on the occasion of the 70th anniversary of the Basic Law, my perspective on the constitutional narrative of the Federal Republic has changed again. My *ceterum censeo* has been for a while now that our 70-year-old *Grundgesetz*, for all its merits and achievements, is no basis for complacency and self-satisfaction in view of the events that we observe around us and also in the [midst of our own constitutional structure](#).

This time, there is no Detjen/Steinbeis family venture on the subject of constitutional history in the strict sense. But there is a book written by Stephan Detjen and myself, for that matter, which happens to appear today.

**Stephan Detjen
Maximilian Steinbeis**



DIE ZAUBER- LEHRLINGE

***Der Streit um die Flüchtlingspolitik
und der Mythos vom Rechtsbruch***



If one wants to fix a date on which the constitutional narrative tipped over, that would be probably January/February 2016. Neither Brexit nor Trump had happened yet. But the submission of the Constitutional Court in Poland by the newly elected PiS majority was already in full swing. And in Germany, Horst Seehofer, then the prime minister of Bavaria and chairman of one of the three federal coalition parties, coined the word of the "rule of lawlessness".

Seehofer used this word to describe the situation that had arisen in the Federal Republic of Germany as a result of its compliance with the Dublin III Regulation during the refugee and migration crisis since September 2015. In our book "[Die Zauberlehrlinge](#)" ("The Sorcerer's Apprentices"), which will be published today

by Klett-Cotta, Stephan Detjen and I explore the question of how the so-called "*Rechtsbruchthese*" (breach-of-law thesis) on the refugee policy 2015/16 came into being, who contributed what to its emergence and evolution, and what damage it did to the constitutional structure of the Federal Republic of Germany.

It still stands today, the breach-of-law thesis, untried and undecided in both parliamentary and constitutional court procedure, and continues to unfold its poisonous effect. Some prominent professors of constitutional law and retired judges of the Federal Constitutional Court have thrown the weight of their own reputation and of the institution they used to represent behind the breach-of-law thesis and up to this day, voluntarily or not, serve the AfD and others as suppliers of *ad auctoritatem* argument material against anyone who legally questions it. The dispute about its merits and about what happened in Germany in terms of constitutional law and policy in 2015/16 must, however, be settled. Hence this book.

Public ownership

Compared to the *Grundgesetz* at 70 years of age, the **Polish** constitution at 22 is still relatively youthful. [TOMASZ KONCEWICZ](#) takes the anniversary of the beleaguered Constitution of 2 April 1997 as an opportunity to reflect on its resilience, its achievements and its future.

In **Germany**, on the occasion of a popular petition in Berlin to expropriate the profiteers of large-scale housing privatisation, a massive debate on private property and socialisation has arisen. [MAX PICHL](#) takes a close look at the distinctly socialist Article 15 of the *Grundgesetz*, so far considered practically meaningless by many constitutional lawyers, which regulates the transfer of "land, natural resources and means of production" into "public ownership or other forms of public enterprise".

+++++A Note from MPIL+++++

*In this year's [MPIL Master Class](#) (May 13–16), Professor Christoph Möllers from Humboldt University will teach a course entitled *Was bedeutet "Herrschaft des Rechts"*? Participants will discuss two strands of Professor Möllers' research: while the first reconceptualizes normativity, the second investigates constitutions as structural links between law and politics that do not solely belong to one or the other.*

If you are interested, please send a cover letter and CV to masterclass2019@mpil.de by April 26. The Class will be in German, but comments in English are also welcome.

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In **Thuringia**, the Minister of Justice is in trouble because a far-right public prosecutor has been conducting criminal investigations against the AfD-critical activist/artist group "Centre for Political Beauty" for months. [KLAUS FERDINAND GÄRDITZ](#) explains why the political subordination of the public prosecutor's office

in Germany makes a lot of sense and why the Thuringian Minister of Justice has presumably done nothing wrong, nevertheless.

Before the second round of presidential elections in **Ukraine**, [ANDRII NEKOLIAK](#) draws our attention to a case before the Ukrainian Constitutional Court concerning the lustration of the Yanukovych government overthrown at the Euromaidan in 2013/14.

From a EU law perspective, [TOBIAS LOCK](#) examines how the **UK's** temporary European Union membership, recently expanded until possibly October, will actually work. In terms of UK constitutional law, [JACK SIMSON CAIRD](#) explains how the Brexit has changed Parliament's role in legislation.

[LASSE SCHULDT](#) sees the planned anti-fake news legislation in **Singapore** as a harbinger of further restrictions on freedom of speech in Southeast Asia.

Elsewhere

[DAVID LÖFFLER](#) is pleased about the new **EU** directive for the protection of whistle blowers.

[MARIANA GKLIATI](#) regards the increased accountability of the **EU** border protection agency Frontex as an important, albeit insufficient, step in the right direction.

[JOHN IP](#) reports on a judgment of the European Court of Human Rights that suspicionless searches and interviews of the **British** border police infringe human rights.

[GAUTAM BHATIA](#) celebrates the decision of the Supreme Court of **Jamaica** to declare the storage of biometric information of all residents unconstitutional as the fruit of the seed planted by the Indian Supreme Court in its *Aadhar* ruling.

MARIUSZ JA#OSZEWSKI reports on new plans by **Polish** Justice Minister Zbigniew Ziobro to bring the [judiciary in Poland under government control](#), as well as on [protest demonstrations by judges](#) against the increasingly aggressive attempts of the PiS government to bring them into line through disciplinary proceedings.

[RIVKA WEILL](#) examines the looming plans in **Israel** to provide parliament with the opportunity to override judicial decisions to declare laws unconstitutional.

That's it for this week. Before I leave you to your painted eggs or whatever holiday frolics you may indulge in, let me point you to this noteworthy father-daughter endeavour which you may find worth your support: [TOM EIJSBOUTS and his daughter ANNA](#) want to make an animated film explaining the EU.

All the best, and happy and restful holidays to you all!

Max Steinbeis

